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No. 98-556

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In The

Supreme Court of the United States

October Term, 1998

ROSELLA E. BURNS, *et al.*,

Petitioners,

vs.

STONE FOREST INDUSTRIES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I.

REPLY TO RESPONDENT'S POINT I: THIS CASE WARRANTS REVIEW BY THIS COURT

A. A Conflict Remains and Results in Inequitable Treatment of Plaintiffs and Conflicting Judicial Interpretations of WARN

Respondent contends that because the split among the circuits on the question presented is asymmetric, there is no conflict. Respondent's Brief at pp. 3-5. First, an asymmetric conflict has never barred review by this Court.[1] Second, and more importantly, Respondent ignores the fact that, based on a full 60 day violation, successful plaintiffs in the Fifth, Sixth, Eighth, Ninth and Tenth Circuits receive approximately 30% less back pay pursuant to the 'work day' calculation of damages[2] than do plaintiffs in the Third Circuit and the district courts in Massachusetts, which have adopted the 'calendar day' approach to calculating damages.[3] This Court should not allow the inequitable distribution of benefits under, and the inconsistent interpretation of this important federal labor law to continue: review and resolution of issues such as this are one of this Court's traditional responsibilities. *See* Sup. Ct. R. 10(a) & (c).

Next, Respondent's contention that the conflict is largely resolved is spurious. As discussed above, the conflict is real and continues

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1. *See, e.g., Musick, Peeler & Garret v. Employers Insurance of Wausau*, 508 U.S. 286, 289 (1993) (5 to 1 split among circuits); *National Labor Relations Board v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 219 n.5 (1978) (7 - 1 split among circuits).

2. In addition to the court below, the following federal courts of appeals have adopted the 'work day' approach to calculating damages under WARN: *Breedlove v. Earthgrains Baking Co.*, 140 F.3d 797 (8th Cir. 1998), *cert. denied*, October 5, 1998, *petition for rehearing filed* October 30, 1998 (Docket No. 98-77); *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, 517 U.S. 1182 (1996); *Saxion v. Titan-C-Mfg.*, 86 F.3d 553 (6th Cir. 1996); *Carpenters Dist. Council v. Dillard Dep't Stores*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

3. *See United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (3rd Cir. 1993) (damages due under WARN for each calendar day of the violation); *Sinischalchi v. Shop-Rite Supermarkets, Inc.*, 903 F. Supp. 182 (D. Mass. 1995) (same); *United Electrical Workers v. Maxim, Inc.*, 5 IER Cases (BNA) 629 (D. Mass. 1990) (same).

unabated. Further, as made clear in the Petition at pp. 10-11, despite reaching the same conclusion, the interpretation of the nature and purpose of the Act in the five circuits that have adopted the 'work day' approach has varied significantly[4], thereby guaranteeing confused and conflicting interpretations of other aspects of the Act.

Significantly, other courts considering the nature of damages under WARN are widely divided, turning as much to the Third Circuit's "calendar day" analysis in *North Star Steel, supra* n.3, as to the 'work day' approach adopted by the five other circuit courts, including the court below. For example, *in a different case arising out of the same plant closing that gives rise to this matter*, Respondent argued, as it does here, that WARN damages are compensatory in nature. *Stone Forest Industries, Inc. v. Bowler*, 934 P.2d 1138 (Or. 1997). In deciding the issue of whether WARN damages are wages for purposes of a state workmen's compensation law, the *Bowler* court did not turn to the 'work day' decisions, but rather to the Third Circuit's 'calendar day' approach in *North Star Steel, supra*, and thus concluded that back pay under WARN is not wages but in fact a penalty. *Id.* at 1140-41. In *Conrad v. Charles Town Races*, 1998 WL 394638 (W. Va. 1998), the court also turned to the *North Star Steel* decision in reaching the same conclusion. *See also Georgia-Pacific v. Unemployment Comp. Bd.*, 630 A.2d 948 (Pa. 1993). Another court facing the same issue, however, reached the opposite conclusion, holding that WARN Act damages are wages. *Labor & Industrial Relations Comm. v. Division of Employment Security*, 856 S.W. 2d 376 (Mo. 1993). Similarly, every bankruptcy court faced with the issue has held that WARN damages are remedial in nature and are thus wages. *See, e.g., In re Hanlin*, 176 B.R. 329 (Bankr. D.N.J. 1995); *In re Riker*, 151 B.R. 823 (Bankr. N.D. Ohio 1993); *In re Cargo*, 138 B.R. 923 (Bankr. N.D. Iowa 1992).

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4. Compare *Burns v. Stone Forest Industries Inc.*, 147 F.3d 1182, 1184 (9th Cir. 1998) (WARN "is a wage workers' equivalent of business interruption insurance" designed to provide "a two month uninterrupted income stream facilitating a job search."); *Carpenters, supra* n.2, at 1283-1285 (purpose of the Act is to provide workers with notice of impending employment loss or to compensate employees for wages they would have earned had proper notice been given); *Breedlove, supra* n.2, at 801 (while compensatory in nature, the WARN Act is also quasi-punitive because violating employers must pay wages for work not performed).

Thus, contrary to Respondent's contentions, the conflict at issue here not only results in the inequitable treatment of plaintiffs across the country and gives rise to forum shopping, but also gives rise to inconsistent interpretations of the very purpose of the Act itself which, as demonstrated above, has widespread ramifications and begs immediate clarification.

B. The Secretary of Labor's Position is Entitled to Substantial Deference

Respondent's argument that the Secretary of Labor's position supporting the 'calendar day' approach is not entitled to deference is specious. Respondent's Brief at 5-6. In short, Respondent argues that the Secretary's position is not entitled to deference because the method of calculating damages is not "necessary to carry out" the Act, but rather is a policy choice.

First, if the proper calculation of damages under a federal act is not necessary for its effectuation, nothing is. Second, Respondent's assertion that the broad delegation to the Secretary to prescribe regulations under the Act[5] does not directly encompass a concomitant delegation of policy making authority is a semantical ruse. *Any delegation of authority to promulgate regulations necessarily entails policy considerations in determining the content of the regulations.* Moreover, as set out at length in the Petition at pp. 13-14, this Court has unambiguously held that, where, as here, there is an interpretative gap in statutory language, the resolution of the ambiguity may often be "more a question of policy than [of] law," and an administrative agency's determination of that policy as reflected in its interpretation of the ambiguous provision is entitled to substantial deference. *Pauley v. Bethenergy Mines, Inc., et al.*, 501 U.S. 680, 696 (1991) Thus, the Secretary's position is entitled to substantial deference and warrants review by the Court.

C. The Work Day Approach is Inconsistent with the Purpose, Provisions and Legislative Intent of WARN

Respondent essentially ignores every argument posited by Petitioners and instead argues that the calendar day approach "contravenes the fundamental purpose of the WARN Act" because it has "an unintended punitive effect" that pressures employers to compel employees to report to an idle plant and do nothing so that the employers may escape 'calendar day' liability. Respondent's Brief at pp. 8-9. As Petitioners address at

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5. *See* 29 U.S.C. § 2107(a).

length in the Petition at pp. 24-26, the Act imposes no liability upon employers who are unable to give advanced notice. 29 U.S.C. § 2102(b). *Moreover, where an employer unlawfully withholds notice, there is still no financial incentive to remain open: the employer must bear the additional cost of maintaining, operating and securing a facility for a full 60 days in addition to paying full wages and benefits for 42 days.* Thus, contrary to Respondent's assertions, there is no situation where an employer will have a financial incentive to compel its workers to report to an idle plant. Finally, as repeatedly stated throughout the entire legislative history of the Act[6] and the pendency of this action, the fundamental purpose of WARN is to ensure that employers give notice to their workers. The incentive must, therefore, work to compel employers to give proper notice 60 days *before* the intended plant closing, *not* to pay additional wages *or* to keep the plant open for additional days.

II.

REPLY TO RESPONDENT'S POINT II: THE CALENDAR DAY APPROACH MAKES MORE SENSE

Respondent again largely ignores the arguments advanced by Petitioners and instead simply restates the rationale of the court below. Petitioners rely in full on their discussion of these issues, which are addressed in the Petition at pp. 20-28. Respondent does make two points, however, that warrant brief responses.

First, Respondent argues that, under the 'calendar day' approach, employers will be penalized for choosing to pay damages in lieu of advanced notice. Respondent's Brief at 11. *This should be the case: Congress, in passing the Act, expressly rejected an amendment that would have permitted pay in lieu of notice,* 134 Cong. Rec. 15,926 (1988), *and subversion of Congressional intent should be penalized.*

Next, Respondent alleges that Petitioners offer no authority for the proposition that "the term 'regular rate' in the WARN Act is derived from the [Fair Labor Standards Act.]" Respondent's Brief at 11. A simple reading of the Petition at pp. 21, n.25, and the position of the Secretary of Labor at p. 49a of the appendix to the Petition, reveals that Respondent's assertion is without merit.

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6. *See* Petition at pp. 14-17.

CONCLUSION

For the reasons stated above and in the Petition, the Petition here for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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